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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

PETITION FOR A WRIT OF CERTIORARI, AND APPENDIX, TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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October Term 1964

No. _____

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - - - *Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of Estate
of Charles D. Dunne, Deceased, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 7, 1965 in action No. 15,959, styled All States Investors, Inc., Plaintiff-Appellee v. The Bankers Bond Company, Inc., and Elinore Sedley, Defendants-Appellants, and James E. Dunne, II, and Moses Master, Administrator of the Estate of Charles D. Dunne, Defendants-Appellees.

THE OFFICIAL AND UNOFFICIAL OPINIONS OF THE DISTRICT AND APPELLATE COURTS.

The petition for writ of certiorari is from a judgment of the United States Court of Appeals for the Sixth Circuit, decided April 7, 1965; petition for rehearing denied May 20, 1965.

There are copied in the Appendix copies of opinions and orders in this action and the companion case of Texas Continental Life Insurance v. Dunne, tried together in 1959, resulting in a hung jury, and in process of trial January 21-23, 1963, when both actions were settled. The settlement in the companion case was consummated.

1. January 8, 1959. Interlocutory order entered January 8, 1959, District Court ruling that bonds of City of West Buechel had been invalidly issued (A. 1).*
2. January 17, 1959. Appeal filed January 17, 1959, from order ruling bonds had been invalidly issued (A. 3).
2. February 6, 1959. Memorandum on appeal filed (A. 4).
4. February 7, 1959. District Court order striking appeal and directing Clerk not to forward Court Record to Court of Appeals for the Sixth Circuit (A. 8).
5. July 15, 1960. Opinion Judge Swinford, District Court Judge, sustaining motion for judgment notwithstanding no verdict by jury in

*"A." refers to the Appendix to this Petition; "a" refers to Appellants' and "b" to Appellees' Appendices in the Court of Appeals.

Texas Continental Life Insurance Company, Plaintiff v. The Bankers Bond Company, Inc., et al., Defendants (187 F. Supp. 14) (A. 9-32).

6. August 7, 1962. Decision United States Court of Appeals (6th C.A.), reversing 187 F. Supp. 14. Texas Continental Life Insurance Company v. Dunne, 307 F. 2d 242 (A. 33-44).
7. January 23, 1963. Trial Order (A. 44).
8. June 6, 1963. Order of Judge Frank W. Wilson, U. S. District Court, Judge, setting out action taken at conference in Chattanooga, Tennessee, on April 27, 1963 (A. 47-49).
9. October 4, 1963. Opinion and order of Honorable Frank W. Wilson, U. S. District Judge, dated October 3, 1963, directing payment for an indemnity agreement of $90,000.00 cash, and $15,000.00 by October 21, 1963, in lieu of the bonds, or have judgment for $257,500.00, with interest, entered against defendants (A. 49-54).
10. October 26, 1963. Order of Court (Judge Frank W. Wilson), overruling motions of petitioners to file defensive pleadings and ordering parties to close settlement on November 12, 1963 by substituting an assignment and indemnity agreement in lieu of bonds which All States Investors, Inc., had agreed to sell The Bankers Bond Company, Inc. (A. 58-61).
11. November 22, 1963. Order granting any party in interest to December 2, 1963 to respond to defendant's, The Bankers Bond Company, Inc., motion to file defensive pleadings, counterclaim and third-party complaint v. A. Berkowitz.
12. December 6, 1963. Opinion by Judge Frank W. Wilson overruling motion to file answer and

third-party complaint by The Bankers Bond Company, Inc., and Elinore Sedley (A. 62).

13. December 13, 1963. Order staying entry of judgment to January 6, 1964 (A. 69).

14. January 2, 1964. Order staying entry of judgment pending final action by U. S. Court of Appeals, Docket No. 15,701 on petition for mandamus, filed by petitioners (A. 70).

15. February 20, 1965. Order United States Court of Appeals (6th C.A.), Docket No. 15,701, overruling petition for writ of prohibition and mandamus (A. 71-72).

16. March 19, 1964. Judgment of Court (A. 73-75).

17. March 24, 1964. Order that judgment entered March 19, 1964 be stayed pending further action by the Court (A. 75-76).

18. April 15, 1964. Opinion of District Court on pending questions (A. 76-79).

19. April 15, 1964. Order modifying judgment entered March 19, 1964, and overruling motions of defendants, The Bankers Bond Company, Inc., and Elinore Sedley, to set aside judgment, and for leave to take depositions of A. Berkowitz, Henry Strasburger, and Honorable Frank W. Wilson (A. 79).

20. April 23, 1964. Order directing plaintiff to respond to motion of defendants to amend judgment and orders entered March 19, 1964, and April 15, 1964 (A. 80-81).

21. May 8, 1964. Order of Court (Judge Wilson) with respect to disposition of action against defendants, J. E. Dunne, II, and Moses Master, Administrator of the Estate of Charles D. Dunne, deceased (A. 81).

22. May 21, 1964. Order amending judgment as modified (A. 81).
23. June 2, 1964. Order by United States Court of Appeals (6th C.A.), overruling appellants' motion to stay proceedings to enforce judgment pending appeal (A. 84).
24. June 2, 1964. Order United States Court of Appeals (6th C.A.), denying application of petitioners for leave to take interlocutory appeal (A. 84).
25. June 2, 1964. Order United States Court of Appeals (6th C.A.), denying motion of respondent, All States Investors, Inc., motion to dismiss appeal (A. 85).
26. April 7, 1965. Decision of United States Court of Appeals entered April 7, 1965, affirming judgment below (A. 87-99).
27. May 20, 1965. Order entered May 20, 1965, United States Court of Appeals (6th C.A.), denying petition for rehearing by defendants-appellants, The Bankers Bond Company, Inc., and Elinore Sedley (A. 100).
28. June 1, 1965. Order United States Court of Appeals staying issuance of the mandate pending due application for certiorari to Supreme Court of the United States (A. 100).

JURISDICTION.

Review is sought of a judgment of the United States Court of Appeals for the Sixth Circuit dated and entered April 7, 1965 (A. 95-107). A timely petition for rehearing was filed April 27, 1965, and denied May 20, 1965 (A. 108). Pursuant to Rule 24 of the

United States Court of Appeals, on motion timely filed, an order was entered on June 1, 1965 by the Court of Appeals staying issuance of the mandate for thirty days, provided that if there is filed within such stay with the Clerk of the Court of Appeals, a certificate of the Clerk of this Court, that this petition, record and brief have been filed, the stay shall continue until final disposition by this Court.

QUESTIONS PRESENTED.

1. Whether, when an action has been settled by a voluntary private contract, and breached by one of the parties, the Court may, on motion of the party in default, acquire jurisdiction to change the contract, order the parties who were not in default to comply with the contract made by the Court, over their objections, by paying the party in original default $105,000.00 or have judgment entered against them for $257,500.00.

2. Whether a settlement of an action is final in the absence of grounds to void a contract.

3. Whether either the District Court, or Court of Appeals may consider the record before settlement to adjudicate the rights and obligations of the parties to a contract, made in settlement of the action.

4. Whether an attorney can bind his client by negotiating for an intended contract, contrary to instructions of his clients.

5. Whether a mutual mistake made in a contract is grounds for the District Court to eliminate the mis-

take, by substituting a new consideration for the promise to pay in the original contract.

6. Whether the Court of Appeals has jurisdiction to treat an interlocutory order of the District Court entered prior to the settlement of the action, and ruled by that Court to be non-appealable, as a final order, on the grounds the order had become final because no appeal had been taken, and then consider the interlocutory order, treated as final, as determining the issues arising out of breach of the settlement.

7. Whether the Court of Appeals should review the proceedings in a pending action in the District Court between the parties to the appeal on petition for rehearing, to determine whether a party to the pending appeal had deceived the District Court by acts of omission, which led the Court to make a decisive ruling, contributing to the judgment entered. It was represented and accepted by the Courts below as true that the bonds had been lost or stolen during trial in 1963. The record in the action pending below contains an admission by officers of respondent that they had not seen the bonds since 1959.

8. Whether the District Court and the Court of Appeals denied due process of law to petitioners, by denying them the right to file a defense, and, to counterelaim, and to take depositions to prove their defenses to the motion, and to a trial of the issues made by the motion and tendered responsive pleadings of the petitioners. *Willner* v. *United States,* 376 U. S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175; *Holt, et al.* v. *Commonwealth of Virginia,* —— U. S. ——, 14 L. Ed. 2d 290, 85 S. Ct. ——; F.R.C.P. 38(a).

9. Whether the Court of Appeals has jurisdiction to rule upon interlocutory orders of the District Court *sua sponte,* from which no appeal was pending. 28 U.S.C. 1291, 1292(4-b).

10. Whether F.R.C.P. 56(e) controls procedure in summary proceedings in the District Court, and whether the judgment is in conflict with its own, and with decisions of other Courts of Appeals. *United States* v. *Ball* (C.C.A. 4), 326 F. 2d 898 @ 902; *Groves* v. *Ohio Turnpike Commission* (C.C.A. 6), 315 F. 2d 235, and cases cited in opinion, in finding that Rule 56 did not control proceedings on a motion for judgment, supported by affidavits.

11. Whether a consent given in a cognovit section of the contract of settlement, applicable if the petitioners defaulted, to the entry of a judgment against them on motion, was void by the law of the State where made.[1]

12. Whether a final judgment can be entered in a multiple claim, multiple party action, without adjudicating the rights of all parties and all claims. F.R.C.P. 54(b).

---

[1] *Kentucky Revised Statute 372.140* provides:

"Power of attorney to confess judgment; release of errors.

"(1) Any power of attorney to confess judgment or to suffer judgment to pass by default or otherwise, and any release of errors, given before an action is instituted, is void.

"(2) No person shall appear for a defendant under any such power in any court in this state."

Kentucky Revised Statute 372.990 provides:

"Any person who violates any of the provisions of subsection (2) of KRS 372.140 shall forfeit one thousand dollars to the defendant, and shall be liable to damages at the suit of the party aggrieved."

STATEMENT OF CASE.

The plaintiffs were residents of Texas; the defendants, residents of the Western District of Kentucky. The amount of the claim involved was in excess of $10,000.00 and arose under the laws of the United States, vesting jurisdiction and venue in the first instance in the United States District Court for the Western District of Kentucky, 28 U.S.C.A. 1331, 1332(a)2, 28 U.S.C.A. 1391, 15 U.S.C. 77v(a), and 15 U.S.C.A. 78aa.

Judge Frank W. Wilson, United States District Judge for the Eastern District of Tennessee, sat by designation.

The second trial started on January 21, 1963. On January 23, 1963, the parties announced:

> ". . . All matters have been settled in each suit and as between each of the parties . . . " (1a).

Entry of a final order was postponed pending the closing within thirty days by the parties of the settlement agreement (1a).

All States Investors, Inc., did not tender delivery of the West Buechel Bonds; the agreement was not consummated (A. 50).

Mr. Berkowitz, counsel for defendants, arranged with Mr. Strasburger, attorney for All States Investors, Inc., for a conference with Judge Frank W. Wilson in Chattanooga on April 27, 1963, to pressure his clients to agree to a modification of the settlement (38a, 39a, 40a).

On April 18, 1963, the respondent filed a motion for judgment.

The petitioners, by Mr. John McCarthy, attorney, moved for dismissal of the action at the April 27, 1963 conference. The transcript, pages 28 and 29, reads:

> "Mr. McCarthy: Yes your Honor. This agreement has a paragraph in it that says that if Bankers Bond doesn't come up with the money and doesn't perform summary judgment shall be issued, and the reason given for that was so this long litigation would be over with. I think it works both ways, with the intention of the parties to end that litigation, to draw up an agreement that the parties were to live by and their rights are to be determined by this rather than by the case that they settled . . .
>
> Mr. Berkowitz: Mr. McCarthy, maybe the client would be better off without me . . .
>
> The Court: Well, the Court, quite frankly, if you have some authority I would be glad to hear you on that. The Court would have great difficulty on any fundamental principles of contract or anything else to understand how this agreement is either enforceable one way or the other, or it would appear to the Court that the original lawsuit remain pending, period. I don't see how the agreement under any circumstances could be interpreted in such a manner as to relieve the agreement of any enforcement and at the same time dismiss the original lawsuit.
>
> Mr. Berkowitz: Here's one thing he is entitled to do, he is entitled to believe it.
>
> The Court: Yes, I'll be glad . . .

> Mr. Berkowitz: And one thing the client is entitled to do, when they have a lawsuit on the same side (laughter). Now, in all seriousness, Mr. Davis, right here in open court I have two obligations, one to you, and that is the primary obligation. I don't ask to be relieved, but I will certainly understand it if I would be. I can't assert on my authority that this action be dismissed. That doesn't mean I'm right, I'm usually wrong. Second (laughter) . . . . may I have a little conference here?"[2]

When the impasse developed between petitioners' attorneys, Mr. McCarthy and Mr. Berkowitz, at the conference on April 27, 1963, the Court directed Henry W. Strasburger, attorney for All States Investors, Inc., to file an amended motion for judgment.

Mr. Strasburger filed the amended motion on May 8, 1963, reading:

> "AMENDED MOTION FOR JUDGMENT TO SAID HONORABLE COURT:
>
> "Comes now All States Investors, Inc., and respectfully moves this Honorable Court to enter judgment in its favor against The Bankers Bond Company, Inc., and Mrs. Elinore Sedley, for $250,000.00 plus interest as prayed for in its Orig-

[2]A preliminary consent decree was entered on April 26, 1963, in the United States District Court for the Northern District of Texas in a stockholders derivative action filed by Mr. Berkowitz against the three original plaintiffs in this action, represented by Mr. Henry Strasburger in both actions. By the consent decree Mr. Berkowitz and his associates received a fee in stock of Professional and Business Men's Insurance Company, formerly known as All States Insurance Company, of the estimated value of $250,000.00 for dismissal of the action (A. 102-114; 8a). Neither the District Court or petitioners were advised at the conference on April 27, 1963 of the decree entered the day before (A. 102-113).

inal and Amended Complaints, and directing Defendants, The Bankers Bond Company, Inc., and Elinore Sedley, to immediately and forthwith deliver to the Hon. Henry Heyburn, of the Louisville, Kentucky, Bar, whose office is in the Kentucky Home Life Building, Louisville, Kentucky, the consideration provided in the Settlement Agreement between the parties dated January 23, 1963, to-wit: a cashier's check for $90,000.00 and a promissory noted dated February 21, 1963, payable in five equal installments of $3,000.00 each, without interest except in the event of default, in which such event notice of the entire balance then due with interest thereon from the date of said default at the rate of 6% per annum, duly signed and executed by The Bankers Bond Company, Inc., and Mrs. Elinore Sedley, personally, and as grounds therefor says . . ."

On October 4, 1963 Judge Wilson ordered The Bankers Bond Company, Inc., and Elinore Sedley to pay $90,000.00 and deliver the note for $15,000.00 for an indemnity agreement, by October 21, 1963, and, that if defendants-petitioners failed to do so, that:

". . . a summary judgment will enter against the defendants in accordance with the stipulation contained in the settlement agreement and in the respective sums there stipulated as to the respective defendants" (Opinion signed by Honorable Frank W. Wilson, Judge, filed October 4, 1963) (A. 62).

The Bankers Bond Company, Inc., and Elinore Sedley discharged Mr. Berkowitz when they learned

from the letters attached to respondent's motion for judgment on file in the Clerk's office that he had arranged the April 27, 1963 conference to pressure them into making a new settlement agreement (52a).

New counsel filed motions to withdraw the opinion (45a-53a), and in support filed an affidavit that petitioners had never agreed to a modification of the settlement agreement (52a, 53a). They moved to file an answer and counterclaim (54a-57a) to the amended motion for judgment (51a-54a).

The answer and counterclaim denied the grounds for plaintiff's motion for judgment, and demanded judgment against All States Investors, Inc., for $50,000.00 damages for breach of the settlement contract. The Court overruled the motion to file the answer and counterclaim (13a), denying petitioners due process of law. *Holt* v. *Commonwealth of Virginia* (decided May 17, 1965), —— U. S. ——, 14 L. Ed. 2d 290, 85 S. Ct. ——.

The Court signed a judgment tendered on December 12, 1963, but withheld entry until March 19, 1964 (18a-20a), pending ruling by the Court of Appeals on a petition filed by petitioners to prohibit the entry of the judgment (16a, 17a). The judgment was modified twice, becoming final on May 21, 1964 (25a).

THE DUNNES.

The Dunnes were parties to the settlement.

They were necessary parties to any proceeding to enforce the settlement by which they agreed to pay petitioners $15,000.00 when the settlement was con-

summated, evidenced by a non-negotiable promissory note, which they delivered. One-half of the contract was consummated when the companion case was settled. In the summary proceedings against petitioners, the Dunnes were overlooked by the Court. Petitioners' rights against the Dunnes were not adjudicated as required by F.R.C.P. 54(b). The contract settled issues between All States and the Dunnes, which were consummated. The question was presented by petitioners upon entry of the judgment on March 19, 1964. All States then moved to dismiss the original action against the Dunnes. The motion was sustained by amendment entered May 21, 1964. The Court did not comply with Rule 54(b).

There has been no adjudication of the rights of petitioners against the Dunnes under the new decree contract. The Dunnes were made parties to the appeal for those reasons.

REASONS FOR GRANTING THE WRIT.

The judgment is repugnant to what is universally accepted contract law; that is, that a party cannot recover damages arising out of his default.

The District Court would not have entered a judgment against the petitioners but for the strange actions of Mr. Berkowitz urging the Court to force a new agreement upon his clients, and acting in concert with counsel for respondent for that purpose. The only plausible answer is that he felt obligated to opposing counsel because they had agreed by court stipulation the day before the April 27th conference (8a) to the

dismissal of his stockholders action against respondent, Biggers, and All States Insurance Company,[3] and the payment of a large fee in stock of All States Insurance Cmpany to him and his associates. He admitted he had two obligations, one to his clients, and the other—he did not name (A. 101). He insisted the bonds were worthless, which was contradiction of his representations to the Court prior to the settlement. The bonds were worth $105,000.00 until February 21, 1963. If they are worthless now, it is because they were made so by the interlocutory order, treated as a final order by the Court of Appeals, the effect of which was that Ben Jack Cage had bought invalid bonds, because he gave a secured promissory note as part of the purchase price (A. 18).

All States placed in its appeal appendix the official reporter's transcript of a preliminary oral ruling of the Court that the bonds in controversy were invalidly issued, filed by the reporter on January 22, 1959.

It omitted from its appendix:

(1) The "Order" of the Court entered January 8, 1959, ruling that the bonds were not issued in conformity with the law of Kentucky, and were therefore invalid (A. 1):

(2) A notice of appeal from the "Order" of the Court (A. 3); and

(3) An order of the Court entered February 7, 1959 striking the notice of appeal and denying the

[3]Name changed to "Professional and Business Men's Insurance Company."

right to prosecute the appeal (A. 8). 28 U.S.C. 1291, 1292(4-b).

Petitioners by reply brief advised the Court that an appeal was filed and stricken by the District Court.

The interlocutory order entered in 1959 became moot by the 1963 settlement. Counsel for respondent could not sustain an argument that the settlement was a unilateral promise to pay. They could not substantiate a claim that petitioners had agreed to a new settlement. They knew that the District Court ruling that an attorney has full power to control the rights of his client was contrary to due process guaranteed by the Seventh Amendment; they knew that the texts cited by the District Court to sustain the ruling, did not. They had to create facts to sustain the District Court judgment.

The purpose was served by inserting into the record on appeal the transcript of the 1959 order, re-open the record of the action that was settled to the extent only of having resolved in its favor one of the principal issues involved in the original action, in which no final orders were ever entered.

Another purpose of respondent was to avoid judicial review of the fact that they had agreed to sell certain bonds, they did not have, to petitioners for $105,000.00, which they now contend were worthless, and known by respondent to be worthless at the time it agreed to sell the bonds. By suggesting to the Court of Appeals the 1959 order, the respondent also suggested that the Court look for "facts" to relieve All

States of its obligation under the contract and affirm a judgment mandatorily entered against petitioners. Any decision against petitioners had to be founded on a final judgment that the bonds had been invalidly issued by the City of West Buechel.

The Court of Appeals entered a footnote, aside, judgment, reading:

> "On a preliminary motion in this case, briefed by counsel, the District Judge held that the bonds were invalid. There is no appeal from that order of January 22, 1959, and we accept it as a final adjudication of the issue."

THE SETTLEMENT HAD THE LEGAL EFFECT OF A FINAL JUDGMENT.

The decision treated the settlement as a proposal subject to revision by the Court. It is in conflict with the Court's own decision in *American Textile Machine Corp.* v. *United States,* 220 F. 2d 584, 586-589 (6 Cir. 1955). There was a compromise agreement after the institution of the action. The government rescinded the agreement and the appellant made no further tender or offer to perform. The Court stated:

> ". . . In keeping with that purpose, appellee's obligation was upon the acceptance of the offer to dismiss the present proceedings 'without prejudice.'
>
> "But it does not follow that, in the absence of default on the part of the debtor, the creditor may at will rescind the accord and proceed to enforce the original obligation. If the accord is supported

by consideration, and is otherwise a valid contract, it cannot be validly repudiated except for cause. Although it does not extinguish the pre-existing obligation, it suspends the enforcement of it until it has been legally abrogated. Archibald McNeil & Sons Co. v. Unted States, supra, D.C. 1 F. 2d 39, 41-43, affirmed, 3 Cir., 10 F. 2d 1016; in re Clarence A. Nachman Co., 2 Cir., 6 F. 2d 427, 430; in re Kellett Aircraft Corp., 3 Cir., 173 F. 2d 689, 692; Ohlendlisk v. Schuler, 6 Cir., 299 F. 182, 189; Restatement, Contracts, Sec. 417(a). Like any other valid contract, it cannot be cancelled or disregarded at the pleasure of one of the parties. Andres v. United States, 115 F. Supp. 901, 126 C. Cls. 571; Albin v. United States, 120 F. Supp. 763, 128 Ct. Cl. 204.

. . . . . .

"We are of the opinion that the District Judge was in error in not giving effect to the compromise settlement agreement, even though it has not been performed. Unless shown that it was not a valid contract or that it has been breached by the appellants, as distinguished from non-performance, it stands as a bar to the prosecution of the present action."

and with the opinions in *United States* v. *William Cramp & Sons Ship & Engine Bldg. Co.,* 206 U. S. 118, 128, 27 S. Ct. 676, 51 L. Ed. 983; *Perkins* v. *Fourniquet,* 14 How. 313, 325, 14 L. Ed. 435; *St. Louis K. & S. E. Railroad Co.* v. *United States,* 267 U. S. 346, 349, 45 S. Ct. 245, 69 L. Ed. 649, on the finality of settlements.

Petitioners contend no action was commenced to have the rights of the parties under the contract of January 23, 1963 declared nor adjudicated, *F.R.C.P.* 3; *Julliard & Co.* v. *Johnson,* 259 F. 2d 837 (2 C.A.); *Muskeat* v. *United States,* 219 U. S. 346, 356; that the Court did not acquire jurisdiction by motion; that all facts inferred by the Court to sustain the judgment were denied by the affidavits of Tyrus Davis *(supra);* that they were denied due process by the refusal of the Court to permit them to file any defense to the motion, or to consider the admitted fact that they had not breached the terms of the settlement contract, which the judgment purports to enforce (Seventh Amendment).

The Court of Appeals (page 9) quoted and cited opinions of this Court, its own, and opinions of other Federal and State Courts of Appeal that a settlement agreement voluntarily entered into cannot be repudiated by either party and will be summarily enforced by the Court. The Court then decided against petitioners on three grounds, each of which are contrary to fact and law, (1) that the substitution of an indemnity bond to defend any action thereafter brought, constituted substantial performance, (2) that the parties were mutually mistaken at the time of the agreement as to the location of the bonds, and (3) that petitioners consented, in the settlement, to entry of judgment against them if they refused to pay All States $105,000.00 for an indemnity bond agreement nine months after All States' default on delivery of the bonds.

The opinion quotes from (pages 9-10), and is in conflict with, *Cummins Diesel Michigan* v. *The Falcon, etc., and W. C. Wright, etc.*, 305 F. 2d 721 (C.A. 7); *Melnick* v. *Binenstock*, 318 P. 533, 179 A. 77 at 78; and *American Textile Machine Corp.* v. *United States*, 220 F. 2d 584, 587-589, C.A. 6, each of which rules a settlement cannot be repudiated by either party (A. 97).

The opinion is in conflict with *Julliard & Co.* v. *Johnson*, 259 F. 2d 837 (2 C.A.), in which the Court ruled:

> "The effect of a compromise and settlement effected by parties competent to contract is that of a judgment which can only be set aside in a direct proceeding. Ogglesby v. Artrell, 105 U. S. 605, 26 L. Ed. 1186, cf. United States v. International Building Co., 345 U. S. 502, 73 S. Ct. 805, 97 L. Ed. 1182."

This Court stated in *United States* v. *Alonzo Child*, 12 Wall. 232, 20 L. Ed. 360, at page 363:

> "In this view of the case it is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. After the compromise, that question was no longer open for inquiry. It is the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the Court of Claims on that subject in another department of the government, this department which sits to administer the law, must be governed by its recognized principles."

The Court of Appeals adopted all of the factual conclusions of the District Judge, each of which was placed in dispute in what the District Court termed summary judgment proceedings. The Court of Appeals states (page 10) that Rule 56 of the Federal Rules of Civil Procedure was not applicable; that the judgment was entered by stipulation and agreement; that it was in the nature of a judgment by consent. The Court's definition of consent is in Footnote 3, page 11, of the opinion to the effect that a consent decree is an agreement of the parties under sanction of the Court as to what the decision shall be. The agreement in this case was a private agreement; was not sanctioned by the Court at the time it was made; and was not of record in the Clerk's office until after the District Court made its ruling (A. 46, 55, 56, 57), on October 9, 1963 (A. 57).

When the companion action was settled on February 21, 1963, the Clerk learned for the first time that he was supposed to have the bonds in this action in his possession. He thereupon advised Judge Wilson in Chattanooga by letter that the bonds had never been in his possession; and that he had never seen any settlement agreement (A. 46).

When the Court's order was entered on October 8, 1963, the Clerk advised Judge Wilson in Chattanooga, Tennessee, by letter, that the agreement had not been filed (A. 56). Judge Wilson then mailed from some source not disclosed, a signed copy of the agreement to the Clerk (A. 57). There is no provision in the agreement that petitioners consented to the entry of

a judgment against them for $257,500.00 in the event the respondent defaulted in its obligations under the agreement.

The Court of Appeals quotes with approval from the opinion of the District Court (A. 95):

> "It is fundamental that a party is bound by the actions of his attorney in the absence of fraud and collusion. 7 C. J. S., Attorney and Client, Section 80; 5 Am. Jur., Attorney at Law, Section 85, et seq. . . ."

5 American Jurisprudence, Attorney at Law, Section 85, outlines what attorneys generally know: That they have control over procedural matters in the absence of fraud or collusion. The section also sets forth what is commonly known to most attorneys; that their agency does not give them the authority to bind their clients on matters which affect the cause of action itself.

The District Court found that Mr. Berkowitz bound the petitioners by his attempts to negotiate a new contract with the attorney for respondent.

5 American Jurisprudence, Section 92, on Attorney at Law, states:

> "92—Limitations on power—The implied authority of an attorney to make stipulations is ordinarily limited to matters of procedure in the management or prosecution of the action; in the absence of special authority, any step which operates as a surrender of the substantial rights of the client will not be upheld by the courts."

7 Corpus Juris Secundum, Attorney at Client, Section 80, states:

> "The broad implied or apparent powers of an attorney with respect to the conduct or control of litigation are, however, limited to matters which relate only to the procedure or remedy. The employment of itself confers upon the attorney no implied or apparent power or authority over the subject matter of the cause of action or defense, and, unless the attorney has expressly been granted authority with respect thereto, the power to deal with or surrender these matters is regarded as remaining exclusively in the client."

The rights of the parties under the private contract of settlement are controlled by Kentucky law. In the briefs filed by petitioners in both the District Court and the Court of Appeals, they relied upon *DeLong* v. *Owsley's Ex'x.,* 308 Ky. 123, 213 S. W. 2d 806:

> "(1-2) An attorney ordinarily has authority to make agreements and stipulations relative to procedural matters and as to how the trial may be conducted in litigation entrusted to him. 5 Am. Jur., Section 82, p. 315; Conrad's Ex'r v. Conrad, 156 Ky. 231, 160 S. W. 937; World Fire & Marine Ins. Co. v. Tapp, 286 Ky. 630, 151 S. W. 2d 340. It therefore follows that appellant's attorney was without authority to agree to waive the pleading of KRS 132.300 as a complete bar to his action, unless his client expressly consented thereto. It is not contended that appellant gave her attorney any authority to make such an agreement."

Neither the District Court nor the Court of Appeals gave any recognition to the Kentucky decision in their opinions, nor to the limitations upon the powers of an attorney in the sections as stated in American Jurisprudence and Corpus Juris Secundum.

If an attorney has the power, in the Sixth Circuit, to surrender, abrogate, or waive the substantive rights of his clients, as the opinions of the Court of Appeals and the District Court state, then it is a question that calls for correction by this Court.

Mr. Berkowitz had his clients attend a conference at which his stated purpose was to have the Court pressure his clients into making a new agreement. Through another attorney, also present, his clients refused to do so. The effect of the Court of Appeals' opinion as applied to the facts of this case is that the petitioners could not stop one of their attorneys from sacrificing their rights.

The writ should be granted to correct the finding of the Court of Appeals that a "mutual mistake" can be corrected by the Court over the opposition of one of the parties to the agreement and enforce the contract as corrected by the Court against the party in compliance with the contract, and in favor of the party in default under the contract.

The writ should be granted because the decision has unsettled the law as to the final and binding effect of a compromise settlement voluntarily made, and for the further reason that a Court should not lift the curtain that fell when the settlement was made, by

re-examining the facts and orders entered in the action prior to the settlement, and making conclusions from such review in justification of its decision.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 24, 1965.